Pincus Elevator and Electric Co. *and* Local 5, International Union of Elevator Constructors. Case 4–CA–19400

August 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 24, 1992, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, and a brief in response to the General Counsel's exception. The General Counsel filed an exception and a supporting brief, and a brief in reply to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified.

1. We reverse the judge's denial of the General Counsel's motion to amend the complaint at the hearing to allege that the Respondent's counsel had questioned employees about the case without giving appropriate assurances as required by *Johnnie's Poultry Co*., 146 NLRB 770 (1964).

At the hearing, the General Counsel called employee John Vassilas, who testified about owner Matt Pincus' statements during a June 1990 employee meeting. In an effort to impeach his testimony, the Respondent introduced a written statement Vassilas had provided to the Respondent's attorney during his investigation of the complaint allegations.

On redirect, the General Counsel explored the circumstances under which the statement was obtained. The Respondent did not object to the General Counsel's questions and chose not to recross-examine Vassilas. Based on Vassilas' answers indicating that the Respondent's attorney had failed to give assurances against reprisals and had interrogated the employees about signing union authorization cards, the General Counsel moved to amend the complaint. The judge granted the motion subject to further briefing.

The General Counsel questioned other employees, who had provided statements to the Respondent's attorney, about the circumstances under which the statements were obtained. The Respondent had an opportunity to cross-examine those witnesses. As part of its case, the Respondent questioned three of its witnesses—employee Leszek Kamel, Pincus, and the Respondent's attorney—about the circumstances under which the statements were obtained.

In the decision, the judge reversed her bench ruling and denied the motion to amend on the ground that it was not timely. We find that the judge erred by not permitting the amendment to the complaint.

In deciding whether to permit the General Counsel's motion to amend the complaint at trial, we consider a variety of factors, including the identity of the party who first introduced evidence relating to the unfair labor practice issue, whether the issue was fully litigated, and whether the Respondent demonstrated that the amendment is prejudicial. *Citizens National Bank of Willmar*, 245 NLRB 389, 390–391 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981).

The issue arose as a result of the effort of the Respondent's attorney to impeach one of the General Counsel's witnesses by introducing the witness' statement obtained during the Respondent's investigation. Once the statement was introduced, the General Counsel reexamined the witness about the circumstances under which the statement was obtained. Thus, it was the Respondent who initially introduced evidence relating to the unfair labor practice issue.

Thereafter, the General Counsel also called other witnesses to testify about whether they had given statements to the Respondent and the circumstances under which statements were obtained. The Respondent had an opportunity to cross-examine those witnesses. Further, the Respondent, in presenting its case, called several witnesses, including the Respondent's attorney, who testified about the circumstances under which statements were obtained. Thus, the parties thoroughly

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, the exceptions, and the briefs adequately present the issues and the position of the parties.

The judge inadvertently included the signifier for a nonexistent fn. 22 in her decision. The judge also inadvertently omitted the pronoun ''them'' from par. 2(b) of the recommended Order and the discriminatees' names from the final paragraph of the notice. We shall correct these errors.

[2] In rejecting the Respondent's economic-necessity defense to the 8(a)(3) discharge allegation, the judge relied in part on her finding that Pincus' mother-in-law provided the largest outstanding loan to the Respondent after the discharges and apparently did not demand repayment and that the Respondent pays rent to Pincus' father. We do not rely on the judge's statements about these obligations.

We agree with the judge that the independent 8(a)(1) allegations in the January 29, 1991 complaint are closely related to the original November 28, 1990 charge. Therefore, we find it unnecessary to pass on the judge's alternative finding that (by virtue of the filing of the July 12, 1991 amended charge) these 8(a)(1) allegations were properly included in the complaint under Casehandling Manual Sec. 10064.5 and case precedent the judge cited.

explored the unfair labor practice issue and we find that it was fully litigated.

Given that the Respondent initially introduced evidence relating to the unfair labor practice issue and that the issue was fully litigated, we cannot agree with the judge that the Respondent would be prejudiced by permitting the motion to amend.[3]

Under Section 102.17 of the Board's Rules and Regulations, a judge has wide discretion to grant or deny motions to amend a complaint. We find, however, that, as the matter has been fully litigated and the amendment conforms the complaint to the evidence, the judge should have granted the motion. See, e.g., *Citizens National Bank of Willmar*, supra, 245 NLRB at 390–391, and *Lion Knitting Mills Co*., 160 NLRB 801, 802 (1966).

2. Because she denied the motion to amend the complaint, the judge did not make specific findings regarding the conversations between the Respondent's attorney and its employees. Therefore, we shall remand the case to the judge to make specific findings and conclusions regarding those conversations.[4]

Having found that the Respondent engaged in unfair labor practices, the judge recommended that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Although we must await the judge's supplemental decision to determine whether the Respondent violated Section 8(a)(1) when taking statements from its employees, we shall now issue an Order specifically remedying those violations found by the judge and affirmed in this decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pincus Elevator and Electric Co., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Remove from its files any reference to the unlawful discharges and notify Vladimir Dolic and Anton Jukic in writing that this has been done and that the discharges will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge Arline Pacht to reevaluate the record evidence in order to make credibility resolutions concerning the conversations between the Respondent's attorney and employees from whom he obtained statements, and to make findings as to whether the Respondent's attorney provided assurances against reprisal in accordance with *Johnnie's Poultry* and as to whether he questioned employees about signing union authorization cards.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order; and that, following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily discharge employees because of their union and protected concerted activities.

WE WILL NOT threaten you with plant closure if you join or support a union.

WE WILL NOT threaten you with discharge if you join or support a union.

WE WILL NOT grant you raises or promise employment benefits in order to discourage support for a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Vladimir Dolic and Anton Jukic immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any interim earnings, plus interest.

WE WILL notify Vladimir Dolic and Anton Jukic that we have removed from our files any reference to

[3] The judge faulted the General Counsel for failing to pursue the issue at an earlier time. We observe that the Respondent's attorney concedes that he advised the General Counsel that appropriate assurances were given when he took the employees' statements. The judge's statement implies that the General Counsel must assume that parties act unlawfully. The Board makes no such assumption, especially where, as here, the Respondent's attorney advised the General Counsel that he had provided the necessary assurances.

[4] Chairman Stephens notes that, in reviewing any findings made by the judge, he will not find a violation solely on the ground of a lack of assurance against reprisals but will consider whether, under all the circumstances, questioning of the employees would tend to coerce them in their exercise of Sec. 7 rights.

their discharges and that the discharges will not be used against them in any way.

PINCUS ELEVATOR AND ELECTRIC CO.

Steven Goldstein, Esq., for the General Counsel.
Michael G. Trachtman, Esq. (Powell, Trachtman, Logan & Carrle King), of Prussia, Pennsylvania, for the Respondent.
Robert C. Cohen, Esq. (Markowitz & Richman), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CAGE

ARLINE PACHT, Administrative Law Judge. On charges filed by Local 5, International Union of Elevator Constructors (the Union) on November 28, 1990, a complaint issued on January 29, 1991 as amended on July 12 and 23, 1991. The complaint alleges that the Respondent, Pincus Elevator and Electric Co. (Respondent or Pincus Elevator) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by threatening employees that the business would be closed, promising employees insurance and pension benefits, increasing an employee's wage rate and then discharging Vladimir Dolic and Anton Jukic. The Respondent filed timely answers denying the commission of the alleged unfair labor practices.

This case was tried on August 6 and 7, 1991, in Philadelphia, pennsylvania, at which time the parties were afforded full opportunity to examine and cross-examine witnesses and to introduce relevant documents.[1] On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

There is no issue as to jurisdiction in this proceeding as the Respondent admitted the allegations relevant to that matter. Accordingly, I find that the Respondent is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 5 is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Pincus Elevator, owned and operated by Matt Pincus, was a small firm with only six employees at the time of the events giving rise to this litigation. The Company was engaged in maintaining, repairing and modernizing or renovating elevators in various buildings in the Philadelphia area.

In December 1989, three union representatives, William Fagan, Jim Martin, and John Davenport, met with Pincus and asked him to consider entering into a collective-bargaining agreement. After reviewing the Union's wage rates and benefit plans, Pincus expressed concern that his firm's wage rates were lower than those set by the Union. Fagan attempted to assure Pincus that a schedule could be arranged which would permit the Respondent to gradually increase wages until they matched the union scale. The meeting ended on a cordial note with Pincus saying that he would get back to the union officials in a few weeks.

On failing to hear from Pincus, Fagan telephoned him the following month. When Pincus told him he had no interest in entering into an agreement, Fagan realized that the Union would have to organize the employees directly.

Typically, Respondent's employees returned to the shop at 4:30 p.m., the end of the workday, to turn in their timecards and discuss any problems with Pincus which may have developed on the job. One such afternoon in late February 1990,[2] Pincus told the men that the Union probably would contact them, lie, and promise them everything. He also told them they would do better to stay with him; that he would try in the near future to give them better salaries and compete with what the Union offered.

In March, Union Representatives Fagan, Dougherty, and Martin did, in fact, contact two of Respondent's employees, mechanic Vladimir Dolic and his helper, Anthony Jukic (Dolic and Jukic, respectively), while they were working on an extensive project at 1510 Chestnut Street (the Chestnut Street job). Martin asked Dolic if he was interested in joining the Union and whether he knew about its programs. Dolic confessed ignorance of such matters whereupon Martin explained the Union's pension, welfare, and education program. He gave Dolic some material outlining the Union's wage scales and benefits and invited him to stop at the union hall to talk further about these matters.

When Dolic returned to the shop at the end of the day, he told Pincus about meeting the union agents and indicated some hesitancy in pursuing the matter. After stating that he had anticipated such an encounter, Pincus told Dolic he wanted to find out what each employee wanted in the way of salary and benefits.

Accordingly, 2 weeks later, Pincus met privately with Dolic, asking him what he wanted from the job. Dolic told Pincus he would like a $1.50 raise, disability insurance, and a pension plan. Pincus promised him a $1 hourly increase effective immediately with another 50-cent raise in September.

However, Pincus told Dolic he would need more time to locate an appropriate company to handle benefits such as a pension plan and insurance program. In the interim, he offered Dolic an extra week of vacation the following year and promised him that after 5 years' employment he would have a third week of paid vacation. In fact, Dolic saw a pay increase in his next paycheck. Moreover, as Pincus promised, Dolic received the additional 50-cent-an-hour raise in September, making him Respondent's highest paid mechanic at $18 an hour.

Union Agent Martin contacted Dolic and Jukic at the Chestnut Street job several times during the next few months. When Martin stopped by to talk with Dolic in May, Pincus, who often visited the worksite, also was on hand. In Pincus' presence, Martin asked Dolic if he had given further thought to the Union. Dolic told him ''I am not ready yet,''

[1] Exhibits offered by the General Counsel will be referred to as G.C. Exh., followed by the appropriate exhibit number; the Respondent's exhibits will be cited as R. Exh. References to the transcript shall be denoted as Tr. followed by the page number.

[2] Unless otherwise noted, all events took place in 1990.

and returned to his work. Martin then asked Pincus, if he had reconsidered entering into a union contract.

Pincus replied that his business was too small for such an undertaking.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Events in June*

In the early part of June, Martin again found Dolic and Jukic with Pincus at the Chestnut Street job. Martin asked Dolic if he had considered the Union and whether he had spoken with his fellow workers about it. Dolic said he still was thinking it over and did not know how his coworkers felt about it. However, he told Martin he was interested in visiting the union hall to learn more about benefits and the education program.

Dolic testified without controversion that when Martin departed, he asked Pincus how he felt about the Union. Pincus answered: ''I will never join the Union. I would rather close the shop. . . . I do not like union . . . you cannot hire your own people. . . . [E]ven if I joined the Union, they are going to fire you guys, and replace you with their own men.'' (Tr. 35.)[3]

Several witnesses testified about a meeting in the latter part of June at which Pincus again allegedly threatened to close his business should his employees opt for union representation. Jukic, for one, testified that at this meeting Pincus made the following statements:

> I do not want a union in my company. My father was in business for thirty years. Now, that business, it is mine. So I want to stay out of the union. . . [I]f you guys sign for the union, I have to close the business. . . I can open another business, a different name. [Tr. 145.]

Jukic also recalled that during this same meeting Pincus told the employees he could pay them as if they were a union company, but at some later time. Further, after urging the employees to stay with him, Pincus remarked that he had never fired anyone in the past and did not want to do so in the future.

Another employee, helper John Vassilas (Vassilas), who was still working for Respondent at the time of the instant proceeding, also testified that at a June meeting Pincus initially stated that he did not object if the men spoke with union representatives, and that if all the employees preferred to join the Union, ''that is the way it would have to be.'' (Tr. 204.) However, Vassilas stated unequivocally that after making this comment Pincus then told the group that he would rather close the shop than go union and later could open up under a different name. On cross-examination, Vassilas conceded that Pincus said he ''could [not] afford it financially to go union ''but expressly denied that his employer tied the closure of the business to financial considerations. (Tr. 207.) Vassilas further testified that Pincus promised the men he would try to provide benefits comparable to those offered by the Union in the future. Lastly, Pincus guaranteed them full-time work if they stayed with him. On cross-examination, Vassilas conceded that a few times in the next several months the employees spoke about the Union in Pincus' presence. However, he did not indicate what they said on such occasions or whether they expressed pro or antiunion sentiments.

Pincus put a more benign gloss on his remarks at the June meeting. He maintained that he told the employees they could join the Union if they wished. Moreover, he indicated that any comment as to going out of business was made solely in the context of financial pressures; this is, he would be compelled to raise his rates in order to meet the higher union wage scale, which would cause him to lose many of his customers.

B. *Events in November prior to the Discharges*

Union agents did not contact the Pincus employees again until sometime in November when by chance, Martin and Fagan encountered Dolic and Jukic during their lunchbreak. Each of the three witnesses who testified about this encounter remembered it somewhat differently. Thus, Fagan stated that Dolic said he was interested in the Union and asked that a meeting be arranged at the union hall for all the Pincus employees. Martin, on the other hand, believed that he was the one who proposed that Dolic and his fellow employees come to the union hall on November 15 to discuss benefits and the education program.

Dolic recalled agreeing to visit the union hall with Jukic after work on November 15, but did not recollect telling the union agents at that time that the rest of the employees also would attend. However, he believed that his coworkers would be likely to accompany him and would be amenable to union representation, for in recent conversations, a number of them had expressed dissatisfaction and frustration with their jobs.[4]

Dolic testified that following his meeting with the union representatives he and Jukic joined two of their coworkers, Leszek Kamel and Nurfet Alic (Kamel and Alic, respectively), for lunch at which time Alic complained that the employees' medical insurance had been canceled. The men then voiced certain discontents with their employer. Dolic took this opportunity to tell them he was going to the union hall on November 15 to see what they had to offer. Alic and Kamel agreed to go with them.

During one of their usual after-work gatherings on or about November 13, Pincus told the men that he was having financial problems caused by the failure of some clients to pay for work already completed. As a result, he instructed them to curtail expenses by exercising greater care in purchasing materials and reducing their driving time. One of the workers asked whether they would be affected by Respond-

[3] Jukic indicated that Dolic told Pincus that he had been contacted by the Union during an employee gathering which took place sometime in May. I conclude that Jukic, a Yugoslav immigrant who was not proficient with the English language, inadvertently erred about when and where Dolic first informed Pincus of his contact with the Union, either because he misunderstood the General Counsel's question or simply forgot the precise month in which the contact occurred.

[4] Variations in Fagan's, Martin's, and Dolic's testimony about who initiated the request for a meeting and whether they agreed that other employees would be included are minor irrelevant. The important point is that after Dolic expressed his interest in the Union he and Jukic agreed to meet with the union agents at their offices after work on November 15.

ent's economic situation. According to the consistent testimony of four witnesses—Dolic, Jukic, Vassilas, and Alic—Pincus responded by assuring the group that they need not worry for there was plenty of work for everyone and that the coming year would be better. In addition, several of these witnesses recalled that Pincus alluded to two new projects he had contracted; one at a building located at 11th and Vine Streets, the other at Pine and 48th Streets. In fact, Pincus had advised Dolic in August that he probably would be assigned to the Pine Street job. Coincidentally, in August, the owner of the 11th and Vine Street building asked Dolic for an estimate to repair the elevator there. When Dolic inadvertently discovered that Pincus already had bid on the job, he declined to submit his own bid so as to avoid competing with his employer. Pincus expressed his appreciation to Dolic when he found out about this.

The employees further testified that during the course of this November meeting Dolic questioned Pincus about a number of concerns. First he asked what had happened to their medical insurance. Pincus explained that the cancellation had been a mistake. Persisting, Dolic asked why no medical insurance was obtained for Jukic and one other employee. Pincus apologized for his neglect and promised to take care of these matters right away. Dolic then inquired about disability insurance and a pension plan. Pincus replied that he had contacted some companies but disability and pension plan were too costly at that time. Dolic insisted that these were very important matters and the workers could not do without them.

Following this meeting, all six employees went out together for coffee and spent the next several hours discussing their frustrations with various working conditions. Dolic told the group that he he was going to the union hall on November 15 at 5 p.m. At this point, all of his coworkers agreed to join him.

Apparently, Dolic's questions to Pincus had an effect. On the day after the meeting, November 14, when Dolic returned to the shop to pick up materials, Pincus informed him he had contacted some insurance companies and had an appointment with one of them the following day to discuss a pension plan.

C. *The November 16 Discharges*

At approximately 3:45 p.m. on November 15, Pincus sent Dolic and Jukic out to repair an elevator at the Bradford Apartments. Dolic testified, and Jukic confirmed, that Pincus told them not to work beyond 4:30 p.m. because he could not afford to pay overtime. After investigating the situation, Dolic surmised that the elevator might not be stopping evenly with the floor because a certain leveling device was faulty. However, it was 4:20 p.m. by the time he completed his inspection. Therefore, he told the building manager he would return the following morning to correct the problem. Dolic further stated that he and Jukic returned to the shop at 4:35 p.m. at which time Pincus told them to return to the Bradford building the following morning and resolve the matter.

After leaving the shop, Dolic and Jukic went to the union hall as they had planned, but their coworkers failed to appear. Nevertheless, the two men met with union agents who gave them material about benefits and wages and toured the school with them. When Fagan asked why it had taken them so long to seek a meeting with the Union, Dolic told him that Pincus had warned him if he tried to join the Union he would fire him or close the Company.

Dolic and Jukic were soon to discover that they would not return to the Bradford job, or any other for that matter, for Pincus had decided to terminate their employment. On arriving at the shop at 8 a.m. the next day, November 16, Pincus told them he would have to lay them off for lack of work. He handed Dolic one check covering a week's vacation pay and, although he was not obliged to do so, also gave him a check for severance pay. Jukic, too, received his regular paycheck plus 1 week's severance pay. as a courtesy, Pincus then drove the men home since, as usual, Dolic had driven the company truck to work.

D. *Respondent's Justification for the Discharges*

Pincus denied having any knowledge that Dolic and Jukic met with union officials on November 15 or that their discharges had anything to do with union activity. In fact, Pincus insisted that Dolic told him on several occasions that he was pleased with his job and was not interested in the Union. However, Pincus did not indicate when Dolic made such statements.

Pincus maintained that the layoffs resulted solely from legitimate business considerations. He explained that he decided to dismiss ''somebody'' when his accountant, Stephen Gilbert, advised him on the evening of November 12 that the business had lost approximately $34,000 in the previous tax year and that steps had to be taken to cut Respondent's losses. (Tr. 288.)

Gilbert testified that he had just completed Respondent's income tax return form for the 1989 business year ending on September 30 and, concerned by the size of the annual loss, scheduled a meeting with Pincus to discuss the firm's economic condition.[5] Gilbert was unsure of the exact date on which they met, but thought it probably took place on or about November 12, even though the tax form was dated November 16. In any event, he and Pincus both recalled that after reviewing the form, Pincus stated that he would have to dismiss someone.

Pincus detailed the reasons he chose Dolic and Jukic for layoff. First, he explained that he targeted Dolic because he was the highest paid employee. He selected Jukic because he was the last hired and had worked almost exclusively as Dolic's helper.[6]

Pincus also stated that his selection of Dolic for layoff was heavily influenced by his receipt of a letter dated August 7 in which the management company for the Chester Street property complained about the lack of progress on the job and the frequent absences of the two men assigned there. Pincus noted that he often visited the Chestnut Street jobsite and would not always find Dolic and Jukic on the site. He also alleged that he spoke to them often about the need to expedite the job.

Dolic, on the other hand, maintained that Pincus never criticized his work; that he only once referred to the Chestnut Street owner's displeasure with the progress on the job, but

[5] Gilbert had served as Respondent's accountant for 30 years when the business was owned by Pincus' father.

[6] Dolic's seniority apparently was not a factor. He first began to work for Respondent in 1986, left after 1-1/2 years for a higher paying job, and returned to the Company in April 1989.

did not attribute the delay to him or Jukic. In fact, Dolic testified that a number of delays on that jobsite either were unavoidable or attributable to Pincus himself. Thus, Dolic stated without dispute that materials did not arrive on time; that on one occasion a piece of equipment was delivered heavily damaged, and that after completing one of the elevators he discovered Pincus had ordered an important piece of equipment in the wrong size. Corroborating Dolic's testimony in this regard, Pincus admitted that the mistake was his and confirmed that a new part had to be ordered and installed.

Pincus also testified about what he perceived to be Dolic's mishandling of the situation at the Bradford Apartments. Thus, he stated that when Dolic and Jukic returned to the shop and told him they would repair the elevator the following morning, he objected and said they could not leave it in that condition. Pincus stated that he subsequently received a telephone call from the Bradford Park's manager, Allen Lindy, who, angered that the elevator had not been repaired, purportedly told Pincus he would cancel his contract with Respondent if the same two men returned to the building. Pincus added that the owner of the Bradford is one of his largest maintenance customers and denied telling Dolic and Jukic to avoid overtime work there.

Respondent called Jacqueline Schofield as its witness who was identified as the manager of the Bradford Park Apartments.[7] Schofield testified that she was extremely irate when Dolic and Jukic left without repairing the elevator, for the building housed some handicapped and elderly tenants. She further stated that she left a message for Pincus when she was unable to reach him by phone and he returned her call either that same evening or the following day at which time she lodged her protest. Two other employees took about 15 minutes to repair the elevator the next morning.

Pincus also claimed that Kamel was a more experienced and competent employee than Dolic. Although conceding that Kamel could neither speak nor read English when he was first hired, Pincus maintained that he had technical training and 15 years' prior experience. In fact, Pincus was wrong in this regard for Kamel testified that he had 11 years' experience before Respondent hired him. Consequently, his qualifications for the job were not greater than Dolic's who had completed technical college training and then worked in Europe for 10 years on every aspect of elevator work prior to coming to the United States. Moreover, he had worked for Respondent for 1-1/2 years before Kamel was hired. In fact, Kamel worked as Dolic's helper for the first 7 months of his employment. Before this case arose, Pincus apparently recognized Dolic's superior skills for he explained to the employees that he was assigning Dolic to the Chestnut Street job on the strength of his experience.

Lastly, Pincus testified that his layoff decision was influenced by the fact that Dolic had been disloyal in quiting his job with Respondent to take a more lucrative position.

On the day that the two men were terminated, Alic, a friend of Dolic's, asked Pincus why he had taken such a step. Alic testified without dispute that Pincus simply answered, ''he had his reasons.'' (Tr. 476.) Alic and Vassilas both maintained that following the discharges their workload increased, even becoming hectic on occasion, and for the first time, employees were shifted from one job to another during the day, rather than being assigned exclusively to one site. In fact, Alic testified that he received some inquiries from owners about the delays caused by the workers being transferred from one site to another. When he told his boss about these complaints, Pincus said he would speak to the owners. Pincus offered uncontradicted explanations for each of the delays.

Although the work force did not expand from the time of the layoffs to the date of the instant trial, the four remaining employees each received pay raises. Pincus explained that he generally granted wage increases to reward quality performance.

The two new renovation projects to which Pincus alluded at the November 13 meeting, both materialized. One of these jobs on 11th Street began in January and lasted a month. Another 1-week job also came up that same month. Alic believed that the second job at 48th and Pine Streets began a month or two after the discharges, but Pincus thought it might have started in late spring. A third major renovation job began in August 1991. Neither of these latter two projects were completed at the time of trial.

VI. DISCUSSION AND CONCLUDING FINDINGS

A. *The 10(b) Issues*

1. The propriety of the complaint

The Respondent contends, inter alia, that two of the allegations in the original complaint are barred by Section 10(b) of the statute and should be dismissed because they were not supported by timely unfair labor practice charges.[8] The facts bearing on this contention follow.

The original charge in this case, filed November 28, 1990, dealt solely with the two 8(a)(3) discharges. When the complaint issued on January 29, 1991, in addition to the discharges of Dolic and Jukic, it contained independent 8(a)(1) allegations that Respondent threatened to close the business in June and promised insurance and pension benefits on November 14 in order to discourage employee support for the Union.

On or about July 12, the Union filed an amended charge accusing Respondent of the very acts which were alleged as independent 8(a)(1) violations in the complaint. On July 23, the Union filed a second amended charge adding an altogether new allegation that in September 1990, the employer unlawfully granted a wage increase to an employee.

After giving notice to the Respondent, the General Counsel[9] moved to amend the complaint at the outset of the hearing on August 5, 1991, in order to incorporate the allegations raised in i the second amended charge. (See G.C. Exh. 2.) Over Respondent's objection, I granted the amendment subject to further briefing by the parties on the issues raised by these matters.

The complaint allegations at issue here were made within 6 months of a timely filed charge. However, as explained

[7] Curiously, Pincus only testified about his conversation with Lindy. He did not mention having any conversation about this incident with Schofield.

[8] Sec. 10(b) provides that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.''

[9] Hereinafter, counsel for the General Counsel will be referred to as General Counsel.

above, the complaint contained two 8(a)(1) allegations which were not set forth in the underlying charge. Thus the real question is not one of timeliness, but whether the 8(a)(1) allegations were properly included in the complaint. In addressing a related issue in *NLRB v. Fant Milling Co*., 360 U.S. 301, 309 (1959), the Supreme Court observed that ''a charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry.'' The Court then held that that a complaint is not restricted to the precise allegations of the charge if during the course of this inquiry new allegations of unlawful conduct are uncovered, so long as they ''are related to those alleged in the charge and . . . grow out of them while the proceeding is before the Board.'' Ibid.

Confirming the *Fant Milling* requirement of a factual nexus between the charge and the complaint allegation, the Board ruled in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), that there must be a showing of factual relatedness between the specific charge allegations and the 8(a)(1) allegations of the complaint.

The Board clarified the standards it would use in determining whether there was a close factual relationship between the charge and the complaint in *Redd-I, Inc*., 290 NLRB 1115 (1988),[10] Specifically, the Board stated that the term ''closely related'' would turn on (1) whether the charge and complaint allegations involve the same legal theory; (2) whether they arise from the game factual circumstances; and (3) whether a respondent would raise similar defenses to both allegations. Id. at 1116.

Under the principles outlined above, I conclude that the 8(a)(1) allegations in the January 29, 1991 complaint are closely related to the charge. Here, the charge alleged that Dolic and Jukic were discharged because of their union and protected concerted activity. While the complaint contained additional allegations regarding threats of business closure and promise of benefits, clearly, distinct acts separate in time, the legal theory underlying all of them is identical; that is, that the Respondent engaged in unlawful conduct as part of an effort to prevent the organization of its employees. See *NLRB v. Kohler Co*., 220 F.2d 3, 6–7 (7th Cir. 1955); *Beretta U.S.A. Corp*., 298 NLRB 232 fn. 1 (1990). The fact that different sections of the Act are involved does not alter this determination. See *Nickles Bakery*, supra at fn. 5.

Further, according to the General Counsel's theory of the case, the discharges were the culmination of a related series of events; that is, the employees were discharged when Pincus determined that his threats of closure and promises of benefits to them and others were insufficient to deter them from interest in union representation. In other words, the discharges allegedly grew out of the same factual circumstances and unlawful motivation that led to the commission of the 8(a)(1) violations.

Even if it was found that the charge was too narrow to support the independent 8(a)(1) allegations of the complaint, the Charging Party subsequently corrected that deficiency by filing the amended charge of July 12. In so doing, the Charging Party and the General Counsel complied with the guidelines set forth in the Casehandling Manual Section 10064.5, in accordance with a procedure the Board expressly endorsed in *Clark Equipment Co*., 278 NLRB 498 fn. 3 (1986); accord: *G. W. Galloway Co*,. 281 NLRB 262 fn. 2 (1986), revd. on other grounds 856 F.2d 275 (D.C. Cir. 1988).

[10] Although *Redd-I* involved the amendment of a complaint alleging a violation of the Act outside the 10(b) period, the tests articulated by the Board in that case seem equally appropriate to fact patterns such as the one in this case.

2. The July 23 amended charge is not time-barred

As mentioned above, a second amended charge issued on July 23, containing new allegations of an unlawful wage increase given in September 1990 to Dolic and a June 1990 threat to fire employees if they supported the Union. Thereafter, the General Counsel moved to amend the complaint to incorporate the amended charges of July 12 and 23. Applying *Redd-I*, supra, I find that these allegations are sufficiently closely related to the original charge to justify their inclusion in the amended complaint and thus are not barred by Section 10(b) of the Act.

In reaching this conclusion, I note that the Respondent suffered no prejudice even though the charges were filed less than a month before the instant trial. The July 12 charges simply conformed to allegations in the original complaint. In refuting the July 23 charges, Respondent was able to present a single witness—Pincus—who did not deny the factual contentions, but instead, claimed that his conduct was not motivated by antiunion animus or knowledge that Dolic and Jukic were engaged in protected activity. In effect, the Respondent's defense was the same one it posed with respect to other purported violations of the Act. Respondent was not burdened by having to search for obscure documents or unattainable witnesses.

3. The ''*Johnnie's Poultry*'' amendment was untimely

During the hearing, the General Counsel again moved to amend the complaint to allege that Respondent's counsel had questioned employees about the case without giving appropriate assurances as required by *Johnnie's Poultry Co*., 146 NLRB 770, 775 (1964).

The requested amendment flowed from the following circumstances. At the hearing, Respondent attempted to impeach General Counsel's witness, John Vassilas with a statement he gave prior to the hearing. On redirect, Vassilas testified that Respondent's counsel had questioned him about the case without assuring him he would suffer no reprisals. I granted the General Counsel's motion to amend subject to further briefing.

On reconsideration, I conclude that the General Counsel's motion to amend the complaint should have been denied as untimely. The General Counsel did not, and, indeed, could not, contend that the proposed amendment was closely related to the timely filed charge within the meaning of the *Redd-I* rule. Instead, counsel suggests that he first learned of the alleged impropriety during the course of Vassilas' testimony. Hence, the violation was in the nature of newly discovered evidence.

Based on counsel's averments, I am not persuaded that the General Counsel was unable to determine prior to the hearing whether or not a *Johnnie's Poultry* violation was committed. The General Counsel acknowledged that Respondent's counsel told him he had taken the employees' statements about the allegations in the complaint a month before the hearing.

At that time, the Government asked Respondent's attorney if he had given the employees assurances against reprisals, and was told that he had. Satisfied, the General Counsel made no further investigation. In explaining his failure to pursue the matter, the General Counsel averred that Respondent had declined to provide copies of the statements prior to the hearing or give him the employees' names and telephone numbers. However, counsel did have access to one such employee—Vassilas—the very witness whose testimony opened the door to the *Johnnie's Poultry* issue. Moreover, Alic, another employee who continued to work for Respondent and was a personal friend of Dolic's, also could have been contacted about this matter. Thus, the General Counsel had the ability to explore this question and could have determined some weeks before the hearing whether an amendment was appropriate. In other words, if the evidence was newly discovered, it was because the General Counsel decided not to pursue the matter at an earlier time.

Having no forewarning that a question would arise about this matter, Respondent's counsel was put at a disadvantage in having to defend against it at the 11th hour. For the foregoing reasons, fundamental fairness requires that I reverse my former ruling, dismiss the amendment, and treat any evidence bearing on an alleged violation of *Johnnie's Poultry* as if received by way of proffer.

B. *Independent Violations of Section 8(a)(1)*

1. Threats of plant closure

Section 8(c) of the Act protects the expression of views, argument or opinion as long as ''such expression contains no threat of reprisal or force or promise of benefit.'' In other words, an employer's right to free speech is not absolute; it must be balanced against the employees' right to organize or refrain from organizing, free of coercion, restraint, and interference. One of the more troubling issues in balancing an employer's rights under Section 8(c) against employees rights under Section 7 is to determine whether an employer's remarks about plant closure during a union organizational campaign are permissible predictions or threats proscribed by Section 8(a)(1). In drawing such distinctions, the Supreme Court provided the following guidance in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969):

> A prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is an implication that employer may or may not take action on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion.

As detailed above, in early June, Pincus flatly told Dolic that he would rather close his business than join the union. He gave no objective reason for his position, merely stating in conclusory fashion that he did not like the Union and assumed he would not be permitted to engage his own employees. These reasons (if they can be called that) are obviously unrelated to ''economic necessities'' or ''demonstrably probable consequences beyond his control.'' Id. In reality, Pincus was doing nothing less than threatening that the Company would close as a retaliatory measure in the event of unionization. As such, his comment was a threat violative of Section 8(a)(1).

During an employee meeting in the latter part of June, Pincus again made some remarks about closing the business. Both Jukic and Vassilas recalled that Pincus said he would rather close the business than accept unionization and would open up a new business under a different name. Pincus did not explicitly deny their testimony.[11] Instead, he skirted the issue and maintained that his comments were couched in terms of the effect unionization would have on his business; that is, that the advent of the Union would increase his costs and he would lose customers. Based on his testimony, the Respondent claims that Pincus reasonably predicted plant closure based on probable consequences beyond his control; that is that higher costs imposed by a union contract would lead to a loss of customers.

Vassilas acknowledged that his boss referred to the financial costs of unionization, but he emphatically insisted that Pincus' reference to such concerns were posed as a separate statement which followed his remark that he would rather close the business than accept unionization. Bearing in mind that Vassilas remained in Respondent's employ at the time he testified, I am persuaded that he accurately and truthfully reported the nature and sequence of Respondent's remarks.[12]

Respondent attempted to impeach Vassilas with a written statement that counsel obtained in preparation for this instant trial. It reads, in pertinent part that: ''Matt never said that he would close the shop if we went with the Union. One time, he said that he would rather it close because of all the money it would cost him if the Union came in to the shop.'' (R. Exh. 9.) I am reluctant to rely on this statement for the circumstances under which it was taken do not vouch for its accuracy. All the employees were together in Pincus' presence when counsel interviewed them and apparently put questions to the group at large. As the employees responded to these questions, counsel took notes and then prepared written statements which were returned to them for signature. Because I do not feel assured that the written words literally were those of Vassilas or that they faithfully captured his verbatim statements during the interview, I prefer to rely on his testimony given in court where I was able to observe that his demeanor was candid and sincere.[13] Thus, while Pincus probably did mention that the pay scale and benefits under a union contract were higher than those the employees currently received, a fact based in reality, he produced no evidence, as it was his burden to do, to support the claim that

[11] Respondent relies on testimony of employee Leszek Kamel who stated that he never heard Pincus say anything about closing the business because of the Union, as proof that Pincus did not make such a threat. Kamel, admittedly, was even less proficient in English than Jukic. Moreover, his testimony on this point came in response to a rather blatant leading question. Therefore, I am not inclined to put much weight on his response.

[12] In crediting Vassilas, I rely both on his demeanor and on the fact that as a current employee he testified against his own employment interest. *Midwestern Mining*, 277 NLRB 221 fn. 1 (1985).

[13] It was clear from Vassilas' heavily accented words that he was foreign born. His written statement, which is perfectly grammatical and reads quite smoothly, does not accurately reflect his speech patterns.

higher wages would lead inevitably to the loss of customers. Neither did he adduce any proof, beyond mere speculation, that the possible loss of an unknown number of customers would cause the demise of the Company. See *Harrison Steel Castings Co*., 262 NLRB 450 (1982), affd. 728 F.2d 831 (7th Cir. 1984).[14] Further, according to Vassilas' credited testimony, I conclude that Pincus did not causally connect higher costs and possible loss of customers to plant closure. His statement that he would ''rather'' close and reopen under a new name had the ring of an implied threat stemming from a subjective predilection against the Union rather than a prediction based on the likely economic consequence of demonstrable fact.[15]

I am mindful that Pincus is charged with threatening plant closure to all the employees as a group on only one occasion, and that, thereafter, they continued to discuss the Union in his presence. However, I am not persuaded that these factors nullify the coercion implicit in his remark. Although the threat of closure was not repeated, it cannot be viewed in isolation, for Pincus made other unlawful statements and took impermissible actions (discussed further below) which, when considered cumulatively, revealed his antipathy to the Union. Accordingly, I conclude that Pincus' statement regarding plant closure tended to coerce the employees in violation of Section 8(a)(1) of the Act.

2. The threat of discharge

At this same employee gathering in late June, according to Jukic's unrefuted testimony, Pincus coupled a request that the employees stay with him with a gratuitous comment that he had never fired anyone in the past and did not want to do so in the future. The employees surely were capable of discerning the intended implication of his words—that is, that those who remained loyal to him by rejecting the Union would not be discharged. *Mark J. Leach Electrical Contractors*, 251 NLRB 1100 fn. 2 (1980).

3. Unlawful inducements

The Wage Increase and Implied Promise of Benefits

The promise or actual grant of benefits is no less unlawful than threats or disciplinary action if the employer's purpose is to dissuade employees from engaging in protected concerted activity or supporting a union.

The amended complaint alleges that the Respondent improperly increased Dolic's wages in September and promised him benefits in November. The propriety of these acts cannot be evaluated without reference to preceding events. Thus, it will be recalled that in March, when Dolic told Pincus of the Union's overtures to him, Pincus asked what he wanted. Dolic's wish list included a $1.50-an-hour raise, disability insurance, and a pension plan. Almost immediately, Dolic received a $10 raise. As promised, the remaining 50-cent pay increase was given in September. Pincus did not reject Dolic's other request, but said he would need more time to locate appropriate carriers. In the interim, he promised Dolic additional vacation time.

The complaint did not indict Respondent for granting Dolic the dollar wage increase or the extra vacation benefits, only because those acts occurred outside the 10(b) period. Nevertheless, that conduct may be taken into account in recognizing that the improper motives which colored Respondent's actions in March continued to taint its conduct in September when Dolic received the balance of the promised raise.

Dolic returned to the subject of benefits at a November 13 employee meeting. First, he asked first why Respondent had failed to provide health insurance for Jukic. He then renewed his inquiry about disability insurance and a pension plan. When Pincus said that such plans were too costly, Dolic stressed the importance of such coverage to the men. The next day, Pincus advised Dolic that he had contacted several insurance firms and was meeting with one of them to discuss a pension plan. The import and purpose of this announcement is clear: one day after Dolic had forcefully expressed the employees' concerns, Pincus attempted to assure him that their complaints were being remedied in order to compete with the Union and retain their loyalty.[16]

Respondent contends that the promise of benefits was unrelated to the employees' involvement in Union or protected concerted activity for Pincus had long been seeking insurance. To support this contention, Respondent relied on a January 18 letter indicating that Pincus was investigating benefit plans before the Union made any overtures to the employees. However, the Union first approached Pincus in December 1989. Thus, the only documentary proof that Pincus made serious inquiry into such matters came after and was prompted by the Union's advent.[17] Accordingly, I conclude that Pincus' statement to Dolic regarding his appointment with an insurance company to consider a pension plan, was tantamount to an implied promise of a benefit in violation of Section 8(a)(1). See *Statler Industries*, 244 NLRB 144, 148 (1979), modified on other grounds 644 F.2d 902 (lst Cir. 1981).

C. *The Discharges Were Unlawful*

1. Applicable precedents

The amended complaint alleges that the Respondent discharged Dolic and Jukic on November 16 in violation of

[14] Following the discharges of Dolic and Jukic, Respondent awarded pay raises to the other employees, yet the record contains no evidence that this regulated in the loss of customers. Moreover, a union agent testified without controversion that he assured Pincus they could arrange a schedule which would permit Respondent to gradually raise wages to union scale. This evidence tends to counter Respondent's contention that Pincus would have to raise his fees so sharply and suddenly that he would lose customers, much less be forced to close his business.

[15] Pincus' statement that Respondent could resume business under a new name suggests that evasion, not economic necessity, would lead to closure.

[16] This is not to imply that Pincus had no genuine interest in providing employment benefits for I found him to be a generally well-intentioned employer who was not indifferent to the well being of his employees. However, I bear in mind that Pincus just learned that his business was losing thousands of dollars. Thus, his promptness in responding to Dolic's demands appears to be motivated at this point in time chiefly by his interest in deterring employees from turning to the Union.

[17] Similarly, Respondent pointed to Vassilas' testimony that Pincus had mentioned the possibility of benefits before he had heard about the Union. However, Vassilas was first hired in late January 1990, after the Union had contacted Pincus .

Section 8(a)(1) and (3). Denying any knowledge that they were engaged in union activity, the Respondent contends that it selected these two employees for layoff solely for reasons of economic necessity. Where, as here, both lawful and unlawful motives are offered to explain an employer's conduct, the Board requires that the evidence be assessed according to the two-part, burden-shifting analysis set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982).[18] Initially, the General Counsel must make a prima facie showing that the employer knew of the employee's protected activity and that this knowledge was a motivating factor in its decision to take discriminatory action. Once the General Counsel has made this showing, ''the burden of persuasion shifts to the employer to prove that the employee would have . . . received the . . . claimed discriminatory action in any event because of unprotected conduct.'' *Champion Parts Rebuilders v. NLRB*, 717 F. 2d 845, 849 fn. 6 (3d Cir. 1983).

2. The General Counsel's case

As described in the Findings of Fact, supra, Dolic and, to a lesser degree, Jukic, engaged in union and protected concerted activity. They were approached on a number of occasions by union agents and Dolic, in particular, expressed interest in finding out about the Union's benefits and education program. In November, shortly before their discharges, Dolic scheduled a November 15 meeting for himself and Jukic at the union hall, and, after advising his coworkers of the meeting, understood that they planned on attending as well. Dolic and Jukic were, however, the only ones to appear at the union hall on the evening immediately before the day of their discharge.

Notwithstanding the Respondent's disclaimers, Pincus had to know that Dolic and Jukic were approached by and gradually became interested in the Union's program. From the first, Dolic candidly told Pincus during an employee gathering that he had spoken with union officials about their wage scales and benefit package, which prompted Pincus to promise he would try to improve their pay rates. Moreover, in an effort to compete with the Union, Pincus granted Dolic a $1.50-an-hour wage increase and additional vacation benefits. In June, Pincus was on the scene when Dolic. told the union agents he was interested in visiting their offices and learning more about the Local's program. Just a few days later, Pincus told employees that he would eventually try to match the Union's benefits. At another employee gathering in November, Dolic pressed Pincus to provide health, disability, and insurance plans for the men. In the past, reference to disability and pension plans had arisen in the context of discussions about the Union. Therefore, it is fair to infer that when Dolic again raised such issues, Respondent viewed him as a gadfly who persisted in reminding him that, unlike the Union, he was not providing benefits to his employees.

Proof that Pincus also knew that Dolic and Jukic arranged and attended a union meeting on November 15 is more elusive. Although no direct evidence exists that Pincus had such knowledge on the morning of November 16 when he terminated them, circumstantial evidence points strongly in that direction. By November 13, all the employees knew of the November 15 union meeting. Respondent's shop was small and the employees gathered at the end of the workday to discuss all manner of things with their employer. Given the informality of Pincus' relationship with his employees, it stands to reason that one of them let him know that Dolic and Jukic visited the union hall.[19]

It also should be recalled that on November 13, after purportedly disclosing that the Company was in poor financial straits Pincus nevertheless assured the employees that there was sufficient work for all of them.[20] Yet, 3 days later, he cited lack of work as the reason for Dolic's and Jukic's dismissals. Further, although Pincus testified that he decided on the evening of November 12 he would lay off one employee right away, it took him 4 more days to decide that he would sever two men. His decision, curiously enough, was made sometime after Dolic and Jukic left work at 4:35 p.m. on November 15 believing that they had an assignment the following morning.

Given these facts, troubling questions present themselves. For example, why was there enough work for six employees on November 13 but not on November 16. Why did Pincus indicate on November 12 that he would lay off only one employee and then take 4 days to decide he would dismiss two employees. Why did he lead Dolic and Jukic to believe they had jobs on the afternoon of November 15 and then suddenly and without prior warning, terminate them the following morning for lack of work. Only one intervening event explains Respondent's anomalous decision—that is, the employees' attendance at the union meeting. The Board often has relied on a coincidence in timing between employees' union activity and their discharge to support an inference of discrimination. See, i.e. *Abbey's Transportation Services*, 284 NLRB 698, 699 (1987), enfd. F.2d 837 (2d Cir. 1988). Such an inference is warranted here.

Little needs to be said with respect to Respondent's opposition to the Union. Pincus signaled his views to the workers early on when he warned them that the Union would lie and make extravagant promises. He told Dolic outright that he did not like the Union and on two occasions told him and the other men that he would rather close his shop than be unionized. He also hinted that employees who supported the Union might be fired. Such statements provide persuasive proof of Respondent's antiunion animus. Id. at 701.

To sum up, evidence of the Respondent's unlawful motivation in discharging Dolic and Jukic rests essentially on three grounds: the timing of the discharges in relation to the employees' union activity, manifestations of Respondent's antiunion bias based on the 8(a)(1) violations and the contradictory nature of Respondent's words and deeds at the time of the terminations. Accordingly, while the the General Counsel's case rests entirely on circumstantial evidence, it is

[18] Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[19] Pincus' curiosity about the men's activity could have been aroused on the afternoon of November 15 for he admitted he was surprised when they returned to the shop after working at the Bradford site, rather driving home directly.

[20] It is not absolutely certain that the meeting between Pincus and his accountant took place on the evening of November 12. The accountant was not sure of the exact meeting date and the tax return which he brought with him to the meeting was dated November 16. If their meeting did not take place until that night, then the accountant's report of the Company's poor economic status could not have affected the discharges which took place that morning.

sufficient to support a prima facie showing that the Respondent discharged the two employees for discriminatory motives. Ibid.

3. The Respondent's defense

In order to meet its burden of proving that the employees were dismissed for bona fide reasons, the Respondent's claims that economic exigencies compelled a reduction in the work force. In answering the complaint, Respondent explained that Dolic and Jukic were selected for reasons of economic necessity. In addition, Dolic was targeted because of his ''incompetent and irresponsible job performance.''(G.C. Ehx. l(h).)

Although the date on which the accountant reviewed the Company's tax return with Pincus is not free of doubt, I assume that they met on or about November l2.[21] It was on that date that the accountant alerted Pincus that the Company had sustained a substantial loss in the preceding tax year. I have no doubt that Pincus recognized the need to cut costs. However, the evidence does not persuade that this was the predominant reason for terminating Dolic and Jukic.

Consider first that Pincus testified, and the accountant confirmed, that on the night they met, Pincus expressed an intent to lay off only one person. Further, the Company's financial health was not as grave as the income tax statement might make it appear. On cross-examination, Respondent's accountant conceded that the tax return did not reflect depreciation which reduced the loss to $25,000. Further, Pincus acknowledged that he was owed a minimum of $10,000 in accounts receivables and received a tax refund in January 1991. Thus, instead of the $33,000 loss reflected on the return, the loss was more in the neighborhood of $15,000. Moreover, while Pincus had outstanding loans, the largest one was money borrowed from his mother-in-law in December, after the two employees were discharged, and apparently, she was not demanding immediate repayment. Finally, Respondent pays rent for its quarters, but the landlord is Pincus' father.

More compelling evidence emerges from what Pincus said and did not say to the employees the day after he met with the accountant. With the Company's fiscal problem fresh in mind, he urged the men to adopt a number of cost-saving measures; yet, did not even hint that a reduction in force might be necessary. To the contrary, when an employee asked what impact the Company's fiscal situation might have on the work force, he assured them there was plenty of work and mentioned certain new contracts he had obtained. Pincus' commitment to retain all six employees on November 13 is wholly inconsistent with and casts great doubt on his claim that 3 days later he was compelled to lay off Dolic and Jukic for lack of work. Moreover, if lack of work was the true reason for the terminations, why did Pincus refuse to reply candidly to the employee who asked why the men were laid off, and instead said cryptically, ''I have my reasons.'' Pincus' evasive reply raises rather than resolves questions about his motives.

Further, on November 14, Pincus mentioned to Dolic that he was taking steps to obtain disability and pension plans. The Company could not be on genuinely hard times if Pincus was contemplating such coverage for its employees. Moreover, it is curious that Pincus would divulge this information to Dolic if he was on the verge of firing him. By the same token, Pincus would not have authorized Dolic and Jukic to return to the Bradford Apartments on the morning of November 16 if he had resolved to dismiss them when they returned to the shop the previous afternoon. Clearly, Pincus had not decided to terminate Dolic and Jukic until sometime after they left work on November 15 and before they arrived at the plant the following morning. The only intervening event, of course, was their attendance at the union meeting.

Moreover, the evidence suggests that if there was a shortage of work, it was short lived. One of the new contracts which Pincus mentioned at the November 13 meeting began in early January. Ironically, Pincus told Dolic in August that he would be assigned to that project. Two other major jobs commenced in subsequent months and were not completed at the time of trial. In addition, Respondent had over 100 maintenance accounts which it serviced on a monthly or bimonthly basis as well as emergency repair work.

It is true that the work force did not expand beyond four employees following the discharges, a fact the Respondent relies upon in contending that there was not enough work for six employees. However, Respondent failed to explain why, following the discharges, Pincus began a practice of shifting the employees from one job to another even though customers complained about the lack of progress in completing the work. Although one employee said they had less overtime in 1991, several others said they sometimes worked at a hectic pace. Moreover, Respondent conceded in its answer to the complaint that a position substantially similar to the one held by Jukic became available in February 1991. Thus, it appears that Respondent did not experience a serious work shortage in 1991 as claimed and, at the risk of disappointing clients, kept the employee complement to four as a litigation stratagem.

In addition to economic necessity, Respondent also offered the following reasons for selecting Dolic for layoff: (1) based on complaints by clients, Pincus concluded that his performance at the Chestnut Street and Bradford Apartment jobs was irresponsible; (2) he was the highest paid employee, and (3) he had been disloyal in the past by quitting for a more lucrative position, as shown below, none of these purported reasons withstand scrutiny.

a. *Respondent did not rely on customer complaints*

The client letter complaining to Respondent about the failure of the two employees assigned to the Chestnut Street job to make greater progress is dated August 7. According to Dolic's credited testimony, Pincus never disclosed this letter to him, reprimand or discipline him for his performance, refer to it when he told the men they were being laid off for lack of work, or cite the complaint as a ground for layoff to the State's unemployment department. In fact, it was not until December 19, a month after the charge was filed in this case, that Respondent first relied upon the August 7 complaint as an additional ground for Dolic's layoff. Clearly, Respondent's actions toward Dolic were not influenced by this complaint until it became convenient to do so.

Further, following receipt of the August 7 complaint, Respondent's actions toward Dolic show that he continued to

[21] Pincus spoke to his employees on November 13 about taking cost-saving measures, suggesting that he learned of the Company's economic reversals on the previous evening, and not on November 16, the date which appeared on the income tax statement.

place great confidence in him. He permitted Dolic and Jukic to remain on the Chestnut Street job until its completion in early November. Significantly, Respondent granted Dolic a 50-cent-an-hour pay increase in September. As Pincus explained, raises were granted for superior performance. In November, acting on Dolic's request, Pincus informed him he was seeking benefit plans for the employees. It may well be that Pincus not only failed to chastise or penalize Dolic in any way following receipt of the August 7 letter, but, in fact, continued to reward him, because he knew that the employees were not responsible for delays at the Chestnut Street site.[23] All things considered, it strains credulity to believe that the August complaint played any role in Respondent's decision to discharge Dolic or Jukic.

It is equally clear that any complaint which Pincus received about Dolic's conduct at the Bradford Apartment played no part in the discharge decision. Pincus professed to be concerned when Dolic failed to complete the repairs on November 15, particularly after receiving a call from the manager there. Yet, he made no effort to correct the problem immediately, either by insisting that Dolic and Jukic return to the site, attending to it himself or contacting another employee who could handle it on an emergency basis.[24] The complaint was registered hours before the layoffs, yet Pincus did not suggest to the employees that it played any part in their layoffs. Moreover, in his pretrial statement provided to the Board's regional office the month after the discharges, Pincus referred solely to the August complaint.

b. *Dolic's pay rate*

Respondent also claimed that Dolic was selected for layoff because in the face of its economic slump, it made sense to dispense with its highest paid employee. However, since Pincus asserted that payraises were given to reward superior performance, it follows that he must have perceived Dolic as his most capable employee. Pincus suggested that Dolic was less experienced and, thus, less qualified and more dispensable than Leszek Kamel. However, according to Kamel's own testimony, Pincus was wrong in stating that he had greater experience than Dolic. Moreover, Kamel's English language skills admittedly were far weaker than Dolic's. While Leszek may have been as competent a craftsman as Dolic, his lack of English speaking proficiency had to impact his versatility in relating to clients or other workmen on the job. One might well wonder why the Respondent would choose to get rid of one of its most capable and senior employees.

Further, if Pincus actually believed that Dolic's rate of pay was more than Respondent could bear, he could have requested him to take a pay cut until business picked up again. In the final analysis, Pincus could not have been genuinely influenced by the wage factor for he terminated Jukic who was earning less than at least one other helper, gave both employees severance pay, although not required to do so, and in subsequent months awarded pay raises to the remaining employees.

c. *Dolic's loyalty*

Pincus also suggested for the first time at the hearing that Dolic's lack of loyalty in quitting his job for a higher paying one influenced his discharge decision. Obviously, this was a hyperbolic afterthought. If Pincus was at all swayed by an employee's loyalty, he might have remembered that the preceding August, Dolic had shown both ethical and loyal behavior by forgoing a contract on which he discovered his employer had bid. By adding new grounds for terminating Dolic at the hearing, Respondent inadvertently supplied further proof that none of its justifications were the real reasons for Dolic's discharge. Where, as here, an employer offers shifting rationales for its actions, an inference arises that the real motive was an impermissible one.

Consistency was not Respondent's strong suit in presenting reasons for either Dolic's or Jukic's layoffs. Respondent supposedly discharged Dolic because he was the highest wage earner, but Jukic was not the highest paid helper. Respondent claimed that Jukic was laid off because he had the least seniority, but if Dolic's original date of employment is counted, he clearly was the most senior employee. Respondent said Jukic was discharged because as Dolic's helper, he would no longer have anyone to work with. Yet, the record establishes that Jukic also worked occasionally with the other mechanics and that helpers were interchangeable. Respondent's resort to shifting and inconsistent grounds to explain its actions toward Dolic and Jukic gives rise to a soundly based inference that its real reasons were unlawful.

The foregoing considerations compel the conclusion that Respondent did not terminate Dolic and Jukic for valid reasons and would not have done so in the absence of their union and protected concerted activity.

CONCLUSIONS OF LAW

1. Respondent, Pincus Elevator and Electric Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 5, International Union of Elevator Constructors, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with plant closure and discharge in the event they organized.

4. Respondent also violated Section 8(a)(l) by granting a pay increase to one employee and promising employment benefits to the entire work force in order to discourage the employees from supporting the Union.

5. Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging Vladimir Dolic and Anton Jukic for their union and protected concerted activities.

6. The unfair labor practices outlined above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall order it to cease and desist therefrom and to take cer-

[23] Although the author of the August 7 letter asked Pincus for an immediate reply, Respondent did not offer any written response into evidence.

[24] Respondent's failure to send an employee or go himself to the Bradford Apartments that very evening suggests that he was concerned about paying overtime wages, as Dolic alleged.

tain affirmative action designed to effectuate the policies of the Act.

Specifically, the Respondent shall be directed to offer employees Dolic and Jukic immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. Further, the Respondent shall be ordered to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent also shall be instructed to remove from its files any reference to Dolic's and Jukic's unlawful discharges and notify them that this has been done and that any such documents will in no way be used against them.

Lastly, the Respondent shall be ordered to post the notice appended to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Pincus Elevator and Electric Co., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily discharging employees because of their union and protected concerted activities.

(b) Impliedly threatening employees with plant closure and discharge if they join a union.

(c) Granting employees wage increases or promising them employment benefits in order to discourage support for the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Vladimir Dolic and Anton Jukic immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner get forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify Dolic and Jukic in writing that this has been done and that the discharge will not be used against in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its in Philadelphia, Pennsylvania facility copies of the attached notice marked ''Appendix.''[26] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days of the date of this Order what steps the Respondent has taken to comply.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''